

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 437 917
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Manuel Neves, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2033

Manuel Neves, Jr.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1, now 5.30-1.

By order dated 19 December 1974, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for two months outright plus six months on 12 months' probation upon finding him guilty of the charge of violation of a statute (46 U.S.C. 224a). The specification found proved alleges that while serving as Master on board the Fishing Vessel CONSTITUTION under authority of the license above captioned, from on or about 29 October 1973, to on or about 4 December 1973, Appellant did willfully employ or engage to perform the duties of mate aboard CONSTITUTION, a fishing vessel of 465.92 gross tons, a person or persons not licensed to perform such duties, in violation of 46 U.S.C. 224a, for a fishing voyage on the high seas that began in Cabo San Lucas, Baja California, Mexico, and terminated in San Diego, California.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the oral testimony of one witness, voyage records and the license and crew list of CONSTITUTION.

In defense, Appellant offered in evidence his own testimony and documents of administrative appeal to a prior charge of violation of this same statute by Appellant which was pending litigation in a California Federal District Court.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of two months outright plus six months on 12 months' probation.

The entire decision and order was served on 19 December 1974. Appeal was perfected on 30 May 1975.

FINDINGS OF FACT

F/V CONSTITUTION is a motor propelled documented fishing vessel of 465.92 gross tons. On 28 October 1973, at San Diego, California, the vessel commenced a voyage on the high seas with two licensed deck officers aboard: the Appellant and Mr. Roman Luz, a licensed Mate. No other person on board the vessel held a license as Master or Mate. During this time Appellant served as Master of the vessel under authority of his duly issued license.

On 29 October 1973, the vessel entered Cabo San Lucas in Baja California, Mexico, to obtain medical attention for Mr. Luz, who was ill. There, Appellant radioed Mr. William Gillis, assistant to the president of C.H.B. Foods, Inc., owner of the vessel, and requested him to provide a replacement mate, since Mr. Luz was hospitalized. Unable to secure a mate, Appellant again departed for the high seas on 29 October 1973 from Cabo San Lucas. During the course of this voyage, until termination at San Diego, California, some person or persons were employed to perform the duties of navigating officer of the watch without being possessed of a license as required by 46 U.S.C. 224a.

In lieu of the charge in this case, the violation could have been charged as "misconduct," since the Appellant was serving under authority of his license.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant lists 14 errors and exceptions, which are either comprehended by the following or not discussed or supported in his brief on appeal, and therefore, not separately set forth herein. Appellant contends that:

(1) the Administrative Law Judge erred in admitting into evidence a copy of the crew list of the fishing vessel Constitution for the voyage which commenced on 28 October 1973 and terminated on 4 December 1973, over Appellant's objection (Exhibit 6);

(2) the provisions of 46 U.S.C. 224a are limited by the provisions of 46 U.S.C. 223, which takes away any grounds for proceeding against Appellant's license, (citing United States v. Silva, S.D. Cal. (1967), 272 F. Supp. 46);

(3) the decision of the Court of Appeals in Bulger v. Benson,

CA 9 (1920), 262 Fed. 929, excludes violation of 46 U.S.C. 224a from the jurisdiction of the Coast Guard under R.S. 4450

APPEARANCE: Driscoll, Harmsen, & Carpenter, San Diego, CA., by
S. Carpenter, Esq.

OPINION

I

At the outset, I note that the questions of law and fact raised in this appeal do not substantially differ from those posed by Appellant, represented by same counsel, in Decision on Appeal No. 1979 dated 26 July 1973. Therefore, in light of my prior enunciations in that decision and the lack of contrary Federal Court decisions in the interim period, I will succinctly reiterate the basis of that decision in this opinion.

With respect to Appellant's objection to the admissibility into evidence of the crew list (Exhibit 6), Appellant contends that there is no proper foundation for the document's admissibility because Rule 902(4) of the Federal Rules of Evidence requires, in the case of certified copies of public records, that the document be "certified as correct by the custodian or other person authorized to make the certification..." Appellant contends that it is not established that Mr. Ralph Gamble, the U.S. Customs Inspector whose signature appeared on the sealed document, was the "custodian or other person authorized" to certify the document.

The admissibility of evidence in these administrative proceedings is addressed by 46 CFR 5.20-95(a) which reads in part: "...strict adherence to the rules of evidence observed in courts is not required." Therefore, in light of the official seal of the Bureau of Customs, the sworn statement of the Investigating Officer as to the identity of the signee as a Bureau of Customs agent with apparent authority to certify, and the flexible adherence to the Federal Rules of Evidence in these proceedings, I find that admission of the crew list was not error.

Furthermore, I must agree with the Judge's statement that this evidence only served to corroborate the testimony of Mr. Francisco Jiminez as to the crew members of the voyage. I also note that Appellant himself testified to the correctness of this document as a list of the crew members aboard the fishing vessel Constitution on this voyage.

II

United States v. Silva, D.C. S.D. Cal. (1967), 272 F. Supp.

46, is distinguished from the present case. The Silva case dealt with the imposition of a monetary penalty for violation of 46 U.S.C. 224a, while the instant case deals with suspension of a Master's license. The decision in Silva is predicated upon a limited holding that 46 CFR 157.30-10 is invalid to the extent that it sets manning standards for certain uninspected vessels because 46 U.S.C. 223, authorizing the setting of manning standards aboard certain vessels, does not apply to fishing vessels. The precedential holding of the Silva case is difficult to formulate due to its attendant confusion. The penalty in that case was assessed for violation of the regulation, not for violation of a statute, and that was the fact situation presented to the court. Dismissal was warranted on the grounds that violation of 46 CFR 157.30-10 cannot be the basis for assessment of any civil penalty. Thus, the court never reached the Coast Guard's fundamental position that violation of 46 U.S.C. 224a itself, and not some regulation, subjects a person to a civil penalty.

46 CFR 157.30-10 is not involved in the instant case. Insofar as the court appears to rely on 46 U.S.C. 223 as applicable and somehow controlling, I must reject its dictum. (See Decision on Appeal No. 1979).

III

Appellant urges that 46 U.S.C. 223 is a more specific statute than 46 U.S.C. 224a and therefore controls in this case. This is incorrect. Section 224a is applicable and controlling in this case.

Section 223 applies only to inspected vessels. CONSTITUTION is not an inspected vessel. Assuming that CONSTITUTION were an inspected vessel, the fact that a minimum number of officers, plus others judged desirable for the safe navigation of the vessel, could not be entered in its certificate of inspection, would not exclude it from the requirement that any persons employed as deck officers be licensed pursuant to section 224a and the Convention it implements.

IV

Appellant relies on Bulger v. Benson, CA 9 (1920), 262 Fed. 929 to support his contention that a violation of 46 U.S.C. 224a is not a "violation of a statute" as contemplated by R.S. 4450 (46 U.S.C. 239). Appellant states that this decision holds that a violation of R.S. 4442 (46 U.S.C. 214) was not grounds for suspension or revocation of a license, even though the section is part of Title 52, Revised Statutes. I will not re-analyze Bulger v. Benson here. (See Decision on Appeal No. 1574). It will suffice

to say that reference to "violation" of R.S. 4442 in the notice of hearing and charges in that case was surplusage. Further, R.S. 4442 is not a substantive statute. It cannot be "Violated," since all it does is state the conditions under which a pilot's license may be issued and suspended or revoked.

The statute violated by Appellant in this case was a substantive one and a part of Title 52, Revised Statutes. Thus, the violation was properly stated as a basis for action under the charge, "Violation of Statute." 46 CFR 137.05-20(b), now 46 CFR 5.05-20(b).

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 19 December 1974, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 16th day of September 1975.

INDEX

Bulger v. Benson

Discussed

Employment

Licensed mates on "convention" vessels

Evidence

Official documents

License

Fishing vessels - licensing requirements

Licensed Personnel

Responsibility of Master towards

Master

"Employment" of mates

Licensed personnel, duty relative to

Misconduct

Licensed officers, insufficient number aboard

Public Records

Authentication